



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**By Electronic Mail and First Class Mail**

**JAN 16 2013**

Bradley W. Hertz, Esq.  
The Sutton Law Firm, PC  
150 Post Street, Suite 405  
San Francisco, CA 94108

RE: MUR 6716  
National Campaign Fund  
and James Lacy, in his official  
capacity as treasurer

Dear Mr. Hertz:

On November 15, 2012, the Federal Election Commission (the "Commission") notified your clients, the National Campaign Fund and James Lacy, in his official capacity as treasurer (the "Committee"), of AR 12-08 indicating that, in the normal course of carrying out its supervisory responsibilities, the Commission became aware of information suggesting that the Committee may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On January 8, 2013, the Commission opened MUR 6716 and found reason to believe that the Committee violated 2 U.S.C. §§ 434(b) and (g), and 11 C.F.R. § 104.4(a), (b) and (c), provisions of the Act and the Commission's regulations. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

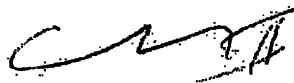
Please note that your clients have a legal obligation to preserve all documents, records and materials relating to this matter until notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "D. McGahn II", written over a horizontal line.

Donald F. McGahn II  
Vice Chair

Enclosures  
Factual and Legal Analysis

# FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS:** National Campaign Fund and James Lacy  
in his official capacity as treasurer

MUR 6716

### I. INTRODUCTION

The Audit Division referred this matter to the Office of General Counsel following an audit of the activity of the National Campaign Fund ("NCF") covering the period from February 4, 2008 through December 31, 2008. *See* 2 U.S.C. § 438(b). *See* Final Audit Report. The Final Audit Report ("FAR"), approved by the Commission on October 22, 2012, contained two referable findings: (1) that NCF misstated financial activity and (2) that NCF failed to timely file 24- and 48-hour notices of independent expenditures and failed to properly disclose independent expenditures on Schedule E of its reports filed with the Commission.<sup>1</sup> On the basis of the FAR, the Commission found reason to believe that NCF and James Lacy in his official capacity as treasurer ("Respondents") violated 2 U.S.C. §§ 434(b) and (g) and 11 C.F.R. § 104.4(a), (b) and (c).

### I. BACKGROUND

NCF is a non-connected committee that has been filing reports with the Commission since January 2008. Pursuant to 2 U.S.C. § 438(b), the Commission authorized an audit of NCF's activity during the period from February 4, 2008 through December 31, 2008. During the audit, the Commission compared NCF's reported financial activity with its bank records and conducted an examination into whether NCF properly reported its expenditures, including those

<sup>1</sup> The FAR is available on the Commission's website. *See Audit Report – National Campaign Fund – 2008*, [http://www.fec.gov/audits/2008/National\\_Campaign\\_Fund/FinalAuditReportoftheCommission1229133.pdf](http://www.fec.gov/audits/2008/National_Campaign_Fund/FinalAuditReportoftheCommission1229133.pdf).

made in connection with separate direct mail fundraising appeals, a number of which included express advocacy.

With respect to the misstatement finding, a comparison of NCF's reported financial activity with its bank records revealed that, for 2008, NCF understated reported disbursements by \$100,887. The understatement of disbursements resulted from a combination of factors: disbursements not reported; reported disbursements not supported by a check or debit; contribution refunds not reported; amounts incorrectly reported; American Express charges not reported; and unexplained differences. FAR at 9.

With respect to the independent expenditure reporting finding, NCF originally reported these expenditures as operating expenditures. After discussions with the Commission's Reports Analysis Division, NCF disclosed over \$1.5 million in independent expenditures on Schedule E of its amended reports and filed, belatedly, most of the 24- and 48-hour notices for most of the expenditures. *See id.* at 11-12. The Audit Division determined that some, but not all, of the fundraising letters disclosed as independent expenditures in NCF's amended reports contained express advocacy and should have been timely disclosed through 24- and 48-hour notices. *Id.*

During the audit process, Respondents asserted that the purpose of their direct mail letters was fundraising, not supporting or opposing candidates in elections, and that as a result, their spending did not require reporting as independent expenditures. *Id.* at 12-14. Rejecting this position, in part, on October 22, 2012, the Commission approved an audit finding that NCF did not timely file 24- and 48-hour notices for independent expenditures of \$946,596, did not file 48-hour notices for independent expenditures of \$51,130, and did not properly disclose independent

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expenditures of \$447,413 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts and Obligations).<sup>2</sup> *See id.* at 15-16.

The Audit Division referred the matter to this Office on November 7, 2012. On November 15, 2012, this Office notified Respondents of the referral in accordance with the Commission's policy regarding notification in non-complaint generated matters. 74 Fed. Reg. 38617 (Aug. 4, 2009). Respondents responded to the Commission's notification on November 15, 2012, reiterating their position that the communications were intended to raise funds, and not to "persuade the voters to vote in a primary or general election during the period involved." Response at 1.

## II. FACTUAL AND LEGAL ANALYSIS

The Federal Election Act of 1971, as amended, (the "Act") requires committee treasurers to file reports of disbursements in accordance with the provisions of 2 U.S.C. § 434. *See* 2 U.S.C. §§ 434(a)(1), (b)(4). NCF did not comply with the Act's reporting requirements when it understated its disbursements by \$100,887, which resulted from failing to report \$104,353 in disbursements and misreporting \$3,466, in its reports in 2008. Therefore, the Commission found reason to believe that NCF violated 2 U.S.C. § 434(b).

The Act defines "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

<sup>2</sup> On August 23, 2012, the Commission considered but failed by a vote of 3-3 to approve an audit finding that NCF did not timely file 24- and 48-hour notices for independent expenditures totaling \$1,153,748, did not file 48-hour notices for independent expenditures totaling \$51,130, and did not properly disclose independent expenditures totaling \$528,662 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts and Obligations). *See* Attachment 1 at 8; Commission Certification for A09-26 (The National Campaign Fund) (August 27, 2012); Statement on Final Audit Report for the National Campaign Fund, A09-26, Comm'rs. Weintraub, Bauerly & Walther.

2 U.S.C. § 431(17). Under the Commission's regulations at 11 C.F.R. § 100.22(a), express advocacy includes phrases such as "vote for the President" or "defeat" accompanied by a picture of one or more candidates. It also includes campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)." *Id.*; see also 11 C.F.R. § 100.22(b).

Every political committee that makes independent expenditures must report those expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R. § 104.3(b)(3)(vii), 11 C.F.R. § 104.4(a). Such a political committee must disclose on Schedule E the name of a person who receives any disbursement during the reporting period in an aggregate amount or value in excess of \$200 within the calendar year in connection with an independent expenditure by the reporting committee. The report also must disclose the date, amount, and purpose of any such independent expenditure and include a statement that indicates whether such independent expenditure is in support of or in opposition to a candidate, as well as the name and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a). Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) of Schedule E. *Id.* Further, a debt or obligation over \$500 must be reported as of the date on which the debt or obligation is incurred. 11 C.F.R. § 104.11(b). Independent expenditures made (*i.e.*, publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and as reportable debt on Schedule D (Debts and Obligations). Committees are required to maintain records that provide information with sufficient detail so that the reports may be verified. 11 C.F.R. § 104.14(b)(1).

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Under certain circumstances, independent expenditures made by a political committee require additional immediate disclosure prior to disclosure on the committee's regularly scheduled disclosure reports. A political committee that makes or contracts to make independent expenditures aggregating \$10,000 or more in connection with a given election at any time during a calendar year up to and including the 20th day before the date of an election is required to file a report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A); 11 C.F.R. § 104.4(b)(2). These reports, known as 48-hour notices, must be filed by the end of the second day "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(b)(2). A political committee is required to file additional reports within 48 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$10,000. 2 U.S.C. § 434(g)(2)(B); 11 C.F.R. § 104.4(b)(2).

A political committee that makes or contracts to make independent expenditures aggregating \$1,000 or more in connection with a given election after the 20th day but more than 24 hours before the date of an election is required to file a report describing the expenditures within 24 hours. 2 U.S.C. § 434(g)(1)(A); 11 C.F.R. § 104.4(c). These reports, known as 24-hour notices, must be filed within 24 hours "following the date on which a communication that constitutes an independent expenditure is publicly distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(c). A political committee must file additional reports within 24 hours after each time it makes or contracts to make independent expenditures aggregating an additional \$1,000. 2 U.S.C. § 434(g)(1)(B); 11 C.F.R. § 104.4(c).

NCF misstated financial activity, did not timely file 24- and 48-hour notices for independent expenditures totaling \$946,596, did not file 48-hour notices for independent

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expenditures totaling \$51,130, and did not properly disclose independent expenditures totaling \$447,413 prior to payment as memo entries on Schedule E and as reportable debts on Schedule D (Debts and Obligations).<sup>3</sup>

Therefore, the Commission found reason to believe that Respondents violated 2 U.S.C. §§ 434(b) and (g) and 11 C.F.R. § 104.4(a), (b) and (c).

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<sup>3</sup> As noted, Respondents asserted during the audit process that the purpose of their direct mail letters was fundraising, not intervening in elections, and that their spending did not require reporting as independent expenditures. The Commission, however, has determined that NCF's communications comprising the referred amounts constitute express advocacy and thus required reporting as independent expenditures.

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